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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DARREN KARL NORMAN,

Defendant and Appellant.

A134611

(Lake County
Super. Ct. No. CR922147)

I.

INTRODUCTION

Darren Karl Norman appeals from his plea and sentence for gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)).¹ He claims the trial court unlawfully chose the aggravated term of 10 years in state prison for the gross vehicular manslaughter conviction, because it improperly: (1) relied on facts to support aggravation of the sentence that were no more than elements necessary to prove the underlying conviction; and (2) ignored relevant factors in mitigation. We disagree and affirm.

II.

PROCEDURAL AND FACTUAL BACKGROUNDS

An information was filed by the Lake County District Attorney on March 25, 2011, charging appellant with one count of gross vehicular manslaughter of Robert Glenn Roe while intoxicated (§ 191.5, subd. (a)). The information further alleged that the charged offense involved the personal infliction of great bodily injury, within the

¹ All further unspecified statutory references are to the Penal Code.

meaning of sections 1192.7, subdivision (c)(8), and 1192.8. The information also charged appellant with one count of driving under the influence causing great bodily injury to Robert Glenn Roe (Veh. Code, § 23153, subd. (a)), and one count of driving with a blood-alcohol level greater than .08 percent (Veh. Code, § 23153, subd. (b)).

Appellant initially pled not guilty to all charges and allegations. On November 14, 2011, appellant entered a change of plea based on a negotiated disposition with the prosecution. Under the agreement, appellant entered an “open” plea of no contest to count one (§ 191.5, subd. (a)). In return, it was agreed that appellant would be sentenced by the court to a term of up to 10 years in state prison, and the other two counts and special allegations would be dismissed by the prosecutor in the interests of justice with a *Harvey* waiver.² Appellant stipulated to a factual basis for the plea as contained in the preliminary hearing transcript. After accepting the plea, the court referred the matter to the probation department for a presentence report, and set a sentencing hearing for January 17, 2012.

Three law enforcement officers were the only witnesses to testify at the preliminary hearing. The first was California Highway Patrol (CHP) Officer Kevin Domby. Domby was dispatched to an accident scene on Highway 20 near Witter Springs Road just before 8:00 p.m. on February 16, 2011. When he arrived, there was a silver Honda Civic with major damage located on the south shoulder of the highway. The male driver, later identified as Roe, appeared to be dead. In the middle of the road was a gray Nissan Altima with major damage; fire personnel were working to extract the driver from the vehicle. Appellant was the driver of the Altima. There also was a commercial tractor-trailer truck stopped on the east side of Highway 20 adjacent to appellant’s Altima. The left front of the truck was damaged.

Officer Domby spoke to the truck’s driver, Rodney Lucero, who told the officer that his rig had been traveling westbound on Highway 20 when appellant attempted to pass him on a curve and hit the Honda. That collision then pushed the Altima into Lucero’s big rig. The roadway is divided by solid yellow double lines.

² *People v. Harvey* (1979) 25 Cal.3d 754.

Officer Domby also examined the inside of appellant's Altima and saw an open bottle of whiskey, along with a receipt. The bottle was 200 milliliters (approximately 6.76 ounces). After contacting the store from which the whiskey had been purchased, Domby learned that appellant bought it approximately one-half hour before the accident. The whiskey bottle found in appellant's Altima was almost empty, and there was no evidence that its contents had been spilled.

The officer later contacted Charles Rojas, a criminalist with the Department of Justice in Santa Rosa. Rojas tested a sample of appellant's blood and determined that it contained a blood-alcohol level of .176 percent, which was rounded down in his report to .17 percent.

CHP Officer Kory Reynolds also responded to the scene on the night of the accident. He interviewed Lucero at the scene, who told him he saw a vehicle approach on the other side of the road when he noticed that appellant was coming up on Lucero's left side to pass him. While Lucero did not see the collision, he heard and felt it. The Altima had come to rest mostly in the westbound lane of Highway 20, facing in a southwesterly direction near the solid yellow double lines.

Later Officer Reynolds spoke to another CHP officer who was at the hospital to which appellant had been airlifted. Appellant was unconscious and the officer detected an odor of alcohol on him. The officer then placed appellant under arrest and ordered a blood draw. Appellant's blood was drawn at almost midnight that night, or about four hours after the accident.

The third officer to testify briefly during the preliminary hearing was CHP Officer Joseph Wind. Officer Wind spoke to a person named Claude Meade, who performed mechanical inspections on both appellant's Nissan Altima and Roe's Honda Civic and found no defects.

Prior to sentencing, the probation department filed a report with the court. The report noted that appellant had suffered a prior misdemeanor conviction for driving under the influence in 2006, for which he had been placed on three years of summary probation. The evaluation and recommendation portion of the report concluded that appellant would

not be a suitable candidate for probation, although he was statutorily eligible. The probation department concluded that the circumstances surrounding the offense were so “egregious” that they outweighed any mitigating factors. Accordingly, the department recommended the upper, or aggravated, term of 10 years in state prison be imposed. The “egregious[ness]” cited in the report was appellant’s “total disregard for the safety of others while driving under the influence of an alcoholic beverage after being previously convicted of the same offense.” Despite its recommendation, the report cited no factors in aggravation, and two mitigating factors. The factors in mitigation included that appellant had an insignificant prior criminal record (Cal. Rules of Court, rule 4.423(b)(1)),³ and that appellant’s prior performance on probation was “satisfactory” (rule 4.423(b)(6)). Attached to the report were several letters in support of appellant written by appellant, his pastor, his former employment supervisor, and family friends.

Sentencing ultimately took place on January 30, 2012. After indicating that the sentencing judge had read and considered the probation report, the parties were provided an opportunity to submit additional information. Roe’s wife and daughter were allowed to make victim impact statements. The defense called appellant’s pastor, Ronald Ballew, who briefly testified on appellant’s behalf.

Counsel then argued the matter of sentence. The prosecutor argued for imposition of the aggravated term, citing as factors appellant’s prior drunk driving conviction, which involved a very high blood-alcohol level (.37 percent). Counsel noted that appellant had completed his probation period for the prior conviction shortly before the subject crime was committed. The district attorney also argued that appellant’s blood-alcohol level at the time of the subject crime was high (.17 percent), and that the circumstances of the accident were “egregious,” citing specifically that appellant had been drinking while in the act of driving, and that he crossed the solid yellow double lines into an incoming lane while engaged in the reckless act of trying to pass a tractor-trailer truck on a blind curve.

Defense counsel spoke of appellant’s remorse, that appellant took responsibility for his crime at an early stage in the proceeding, and his efforts to pay restitution to the

³ All further rule references are to the California Rules of Court.

family of the victim. Counsel argued that these constituted factors in mitigation, in addition to the two factors in mitigation cited in the probation report. In all, defense counsel asked the court to impose the low term, or, at most, the midterm in state prison.

The trial court then denied probation.⁴ After doing so, the court expressed its disagreement with the probation report that there were no factors in aggravation. The court cited to the fact that this particular crime involved a high degree of callousness, noting that appellant's driving pattern was atrocious, by crossing the center line of the roadway on a blind curve. Appellant also had a very high blood-alcohol level.

As to the factors cited in the probation report in mitigation, the court noted its disagreement with the first cited factor: an insignificant prior criminal record. The court pointed to the fact that the prior conviction resulted from a crash while appellant had a very high blood-alcohol level.⁵ In addition, the prior conviction occurred only a few years before the subject incident, and appellant had "just barely" finished his probationary period before this second drunk driving incident took place. In sum, the court concluded that the factors in aggravation outweighed any factors in mitigation, and the court imposed the upper term of 10 years in state prison, less custody credits. Other fines and penalties were also imposed, which are not challenged on appeal.

III.

LEGAL DISCUSSION

A. Did the Court Properly Impose the Upper Term for Gross Vehicular Manslaughter While Intoxicated?

On appeal, appellant's primary objection to his sentence is that there were no aggravating factors articulated by the trial court that were not also minimum elements of the underlying crime of gross vehicular manslaughter while intoxicated. He also contends that the trial court virtually ignored the mitigating factors cited. Therefore,

⁴ This sentencing choice was not contested below or on appeal.

⁵ The prosecutor stated that appellant's blood-alcohol level at the time of the prior offense was .37 percent. No one challenged this figure, but the record does not contain independent verification of this fact.

appellant claims the court's sentencing choice was an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.)

Appellant's main argument is that there is nothing unique about this particular violation of section 191.5, subdivision (a), that would elevate its circumstances to the level where they can be used to impose the aggravated term.

It is clear that a fact that is an element of the crime cannot be used to impose the upper term. (See rule 4.420(d) [“[a] fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term”].) However, in examining whether the trial court improperly used facts to aggravate his sentence that were also elements of the underlying offense, “where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence. [Citation.]” (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562 (*Castorena*).)

Section 191.5, subdivision (a), provides: “(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.”

Thus, the elements of this crime are: (1) driving a motor vehicle while having a blood-alcohol level of at least .08 percent; (2) while driving under the influence the defendant committed a misdemeanor, infraction, or an otherwise lawful act that results in the death of another; and (3) the defendant committed the act specified in (2) in a grossly negligent manner. (CALCRIM No. 590.)

The term “gross negligence” has been defined by our Supreme Court as follows: “ ‘[G]ross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] ‘The state of mind of a person who acts with conscious indifferences to the consequences is simply, ‘I

don't care what happens.' ” [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved. [Citation.]" (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036 . . .)" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1204.)

In *Castorena*, the defendant was convicted of the same crime as appellant; gross vehicular manslaughter while intoxicated. In sentencing the defendant in that case, the trial court relied on the following facts to impose the aggravated term in state prison: “ ‘The evidence clearly demonstrated the defendant was malicious in his conduct and that such conduct involved planning. . . . After having been told he was too drunk to drive, after having his keys taken away and after being offered another means of transportation, defendant drove anyway, apparently because he would have been inconvenienced [because he needed to have his keys to drive to work the next day]. [¶] In addition, . . . the evidence demonstrated that the defendant in his driving was attempting to avoid detection. Also, while an element of this crime is gross negligence, defendant's conduct exceeded even the word gross. While at almost three times the legal limit of blood alcohol[,] it was .20, as I recall, he drove at speeds up to 100 miles an hour on the wrong side of the road running several red lights and narrowly missing injury to several other persons after having consumed 10 to 12 glasses of beer and 4 glasses of brandy. . . . [¶] . . . [¶] Because of the gravity and weight of the aggravating factors, defendant is sentenced to the upper term of 10 years in state prison.’ ” (*Castorena, supra*, 51 Cal.App.4th at pp. 561-562, fn. omitted.) The judgment was affirmed after the appellate court concluded that the facts relied on by the trial court went beyond the minimum needed to support the underlying conviction. (*Id.* at p. 563.)

A proper aggravating factor is when the sentencing court finds that the underlying crime was committed with a “high degree of cruelty, viciousness, or callousness.” (Rule 4.421(a)(1).) We find the trial court properly imposed the upper term based on the aggravated nature of the underlying facts of this offense, which far exceeded those necessary to establish vehicular manslaughter with gross negligence while intoxicated, and which support an fair inference that appellant acted with viciousness and callousness.

As in *Castorena*, the sentencing judge in this case noted that appellant's blood-alcohol level was .17 percent, almost double the minimum to support a conviction under section 191.5, subdivision (a), and a blood-alcohol level almost equal to *Castorena*'s. The "egregious" other facts relied on by the trial court to find callousness included that appellant here did not simply get into his vehicle and drive after he had been drinking. Instead, he purchased a bottle of whiskey approximately 30 minutes before the accident, and was actually drinking while he was driving the Altima. After consuming almost an entire 200-milliliter bottle of whiskey, appellant then attempted to pass a large tractor-trailer truck on a blind curve, moving across a double yellow center line into the oncoming lane of traffic where he collided with Roe's Honda Civic, killing him. The court's reliance on the facts articulated on the record, went far beyond those necessary to prove the underlying crime, was proper, and the trial court did not err in imposing the upper term.

Appellant also claims that in imposing the upper term, the trial court wrongly relied on his single prior misdemeanor offense to impose the aggravated term, while ignoring several mitigating factors, such as his insignificant prior record (rule 4.423(b)(1)) and the fact that he voluntarily acknowledged wrongdoing at an early stage of the criminal process (rule 4.423(b)(3)).

As to appellant's first assertion that his prior conviction was insignificant and should not have been used to aggravate his sentence, we note that even if appellant were correct, it would not require reversal of the sentence. A "single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. [Citation.]" (*People v. Black* (2007) 41 Cal.4th 799, 813.)

As to his contention that the trial judge "ignore[d]" mitigating factors, first there is nothing in the record to support appellant's speculation that the trial court "ignore[d]" any potential mitigating factors. We note that a trial court has no obligation to make an express statement of reasons as to why it deemed the proffered factors in mitigation insignificant. Thus, unless the record affirmatively indicates to the contrary, a trial court is presumed to have considered all relevant criteria, including any mitigating factors.

(*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318.) Appellant has failed to cite anything in this record that would undermine the presumption that the court considered, but was not persuaded by, the mitigating factors that were argued at the sentencing hearing. (See *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1317-1318, fns. omitted.)

To the contrary, the court expressed its disagreement with the probation department's conclusion that appellant's prior conviction was insignificant or that his prior probationary period had been a "success." Moreover, to the extent there were mitigating factors, the court explicitly stated that they were outweighed by the aggravating factors.

Consequently, appellant has failed to show an abuse of discretion; and there is no need to remand the matter for resentencing.

IV.

DISPOSITION

The judgment and sentence are affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.